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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Ernesto Valencia,

No. CV 13-0655-PHX-RCB (JFM)

10 Plaintiff,

11 vs.

ORDER

12 Lt. Vasquez #5241,

13 Defendant.
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16 On April 2, 2013, Plaintiff Ernesto Valencia, who is confined in the Arizona State
17 Prison Complex, Winchester Unit, in Tucson, Arizona, filed a *pro se* civil rights
18 Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma*
19 *Pauperis*. In a May 10, 2013 Order, the Court granted the Application to Proceed and
20 dismissed the Complaint because Plaintiff had failed to state a claim. The Court gave
21 Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the
22 Order.

23 On June 3, 2013, Plaintiff filed his First Amended Complaint (Doc. 10).¹ The
24 Court will dismiss the First Amended Complaint for failure to state a claim with leave to
25 amend.

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27 ¹ Contrary to the Court's instruction in its May 10, 2013 Order, Plaintiff marked
28 on the court-approved form that he was filing an "Original Complaint." Nevertheless, the
Court will designate the document filed in docket number 10 as Plaintiff's First Amended
Complaint.

I. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

A pleading must contain a “short and plain statement of the claim *showing* that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not demand detailed factual allegations, “it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

“[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual allegations may be consistent with a constitutional claim, a court must assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

But as the United States Court of Appeals for the Ninth Circuit has instructed, courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

1 If the Court determines that a pleading could be cured by the allegation of other
2 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal
3 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The
4 Court should not, however, advise the litigant how to cure the defects. This type of
5 advice “would undermine district judges’ role as impartial decisionmakers.” *Pliler v.*
6 *Ford*, 542 U.S. 225, 231 (2004); *see also Lopez*, 203 F.3d at 1131 n.13 (declining to
7 decide whether the court was required to inform a litigant of deficiencies). The Court
8 will dismiss Plaintiff’s First Amended Complaint for failure to state a claim, but because
9 the First Amended Complaint may possibly be saved by amendment, the Court will
10 dismiss the First Amended Complaint with leave to amend.

11 **II. First Amended Complaint**

12 Plaintiff alleges one count of racial profiling, in violation of his Fourteenth
13 Amendment rights. He names as Defendant Phoenix Police Lieutenant Vasquez #5241.
14 Plaintiff seeks punitive damages.

15 In his First Amended Complaint, Plaintiff alleges the very same facts that the
16 Court found deficient in in Plaintiff’s original Complaint. Plaintiff again alleges that he
17 was arrested and booked on unspecified charges after Lieutenant Vasquez told Plaintiff
18 that he fit the description of a suspect. According to Plaintiff, the suspect in question was
19 described as a white male with long, light brown hair who was heavily tattooed and
20 wearing a white tank top. Plaintiff asserts that he is tattooed and was wearing a tank top
21 but that he is Hispanic, with long, dark brown hair. Plaintiff fails to see how he fits the
22 description of a white male with long, light brown hair. As in its initial Order, the Court
23 construes these allegations as asserting claims for discriminatory law enforcement in
24 violation of Plaintiff’s federal constitutional rights.

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Additional Background

According to records available online, Plaintiff pleaded guilty to burglary in Maricopa County Superior Court case #CR2013-107179.² Plaintiff was sentenced on April 29, 2013 to 3.5 years in prison.³

III. Failure to State a Claim

As the Court previously informed Plaintiff, to state a claim under § 1983, a plaintiff must allege facts supporting that (1) the conduct about which he complains was committed by a person acting under the color of state law and (2) the conduct deprived him of a federal constitutional or statutory right. *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989). In addition, a plaintiff must allege that he suffered a specific injury as a result of the conduct of a particular defendant and he must allege an affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

To state a claim against a defendant, “[a] plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the deprivation of his civil rights.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). For an individual to be liable in his official capacity, a plaintiff must allege that the official acted as a result of a policy, practice, or custom. *See Cortez v. County of Los Angeles*, 294 F.3d 1186, 1188 (9th Cir. 2001). In addition, there is no *respondeat superior* liability under § 1983, so a defendant’s position as the supervisor of someone who allegedly violated a plaintiff’s constitutional rights does not make him liable. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in his individual capacity, “is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.” *Taylor*, 880 F.2d at 1045.

²See <http://www.courtminutes.maricopa.gov/docs/Criminal/052013/m5750664.pdf> (last visited June 5, 2013).

³ *Id.*

1 Also, as the Court previously informed Plaintiff, claims of discriminatory law
2 enforcement are judged according to equal protection standards. *Wayte v. United States*,
3 470 U.S. 598, 608 (1985); accord *Dunn v. Hyra*, 676 F.Supp.2d 1172, 1193 (W.D. Wash.
4 2009); see *Ortega Melendres v. Arpaio*, 598 F.Supp.2d 1025, 1037 (D. Ariz. 2009). “To
5 state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the
6 Fourteenth Amendment, a plaintiff must show that the defendants acted with an intent or
7 purpose to discriminate against the plaintiff based upon membership in a protected class.”
8 *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001).

9 Plaintiff alleges that he is Hispanic and that Vasquez “attempted to stop” him even
10 though a description for the suspect was described as white. As noted in the Court’s
11 previous Order, Plaintiff fails to allege basic facts such as when Vasquez “attempted to
12 stop” him. He also fails to allege whether Vasquez actually arrested him, and if so, the
13 offense charged or the resolution of the charges. Plaintiff has failed to allege that
14 Vasquez was acting as a result of a policy, practice, or custom. Finally, Plaintiff has
15 failed to set forth evidence of unlawful intent or purpose to discriminate against him
16 based upon his membership in a protected class. In short, Plaintiff fails to sufficiently
17 allege facts to support that Vasquez violated his constitutional rights. Plaintiff therefore
18 fails to state a claim against Defendant and his Complaint will be dismissed without
19 prejudice.

20 **IV. Leave to Amend**

21 For the foregoing reasons, Plaintiff’s First Amended Complaint will be dismissed
22 for failure to state a claim upon which relief may be granted. Within 30 days, Plaintiff
23 may submit a second amended complaint to cure the deficiencies outlined above. The
24 Clerk of Court will mail Plaintiff a court-approved form to use for filing a second
25 amended complaint. If Plaintiff fails to use the court-approved form, the Court may
26 strike the second amended complaint and dismiss this action without further notice to
27 Plaintiff.

28 Plaintiff must clearly designate on the face of the document that it is the “Second

1 Amended Complaint.” The second amended complaint must be retyped or rewritten in
 2 its entirety on the court-approved form and may not incorporate any part of the original
 3 Complaint or First Amended Complaint by reference. Plaintiff may include only one
 4 claim per count.

5 A second amended complaint supersedes the original Complaint and First
 6 Amended Complaint. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal*
 7 *Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir. 1990). After
 8 amendment, the Court will treat the original Complaint and First Amended Complaint as
 9 nonexistent. *Ferdik*, 963 F.2d at 1262. Any cause of action that was raised in the
 10 original Complaint or First Amended complaint is waived if it is not raised in a second
 11 amended complaint. *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

12 **V. Warnings**

13 **A. Release**

14 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his
 15 release. Also, within 30 days of his release, he must either (1) notify the Court that he
 16 intends to pay the balance or (2) show good cause, in writing, why he cannot. Failure to
 17 comply may result in dismissal of this action.

18 **B. Address Changes**

19 Plaintiff must file and serve a notice of a change of address in accordance with
 20 Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion
 21 for other relief with a notice of change of address. Failure to comply may result in
 22 dismissal of this action.

23 **C. Copies**

24 Plaintiff must submit an additional copy of every filing for use by the Court. *See*
 25 LRCiv 5.4. Failure to comply may result in the filing being stricken without further
 26 notice to Plaintiff.

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1 **D. Possible “Strike”**

2 Because the First Amended Complaint has been dismissed for failure to state a
3 claim, if Plaintiff fails to file a second amended complaint correcting the deficiencies
4 identified in this Order, the dismissal may count as a “strike” under the “3-strikes”
5 provision of 28 U.S.C. § 1915(g). Under the 3-strikes provision, a prisoner may not bring
6 a civil action or appeal a civil judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the
7 prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility,
8 brought an action or appeal in a court of the United States that was dismissed on the
9 grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be
10 granted, unless the prisoner is under imminent danger of serious physical injury.” 28
11 U.S.C. § 1915(g).

12 **E. Possible Dismissal**

13 If Plaintiff fails to timely comply with every provision of this Order, including
14 these warnings, the Court may dismiss this action without further notice. *See Ferdik*, 963
15 F.2d at 1260-61 (a district court may dismiss an action for failure to comply with any
16 order of the Court).

17 **IT IS ORDERED:**

18 (1) The First Amended Complaint (Doc. 10) is **dismissed** for failure to state a
19 claim. Plaintiff has **30 days** from the date this Order is filed to file a second amended
20 complaint in compliance with this Order.

21 (2) If Plaintiff fails to file a second amended complaint within 30 days, the
22 Clerk of Court must, without further notice, enter a judgment of dismissal of this action
23 with prejudice that states that the dismissal may count as a “strike” under 28 U.S.C.
24 § 1915(g).

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1 (3) The Clerk of Court must mail Plaintiff a court-approved form for filing a
2 civil rights complaint by a prisoner.

3 DATED this 6th day of June, 2013.

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7 Robert C. Broomfield
8 Senior United States District Judge
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**Instructions for Prisoners Applying for Leave to Proceed *in Forma Pauperis*
Pursuant to 28 U.S.C. § 1915 in a Civil Action (Non-habeas) in Federal Court**

You must pay the \$350.00 filing fee plus the \$50.00 administrative fees for a civil action. If you later file an appeal, you will be obligated to pay the \$455.00 filing fee for the appeal.

If you have enough money to pay the full \$400.00 filing and administrative fees, you should send a cashier's check or money order payable to the Clerk of the Court with your complaint.

If you do not have enough money to pay the full \$400.00 filing and administrative fees, you can file the action without prepaying the fees. However, the court will assess an initial partial filing fee. The initial partial filing fee will be the greater of 20% of the average monthly deposits or 20% of the average monthly balance in your prison or jail account for the six months immediately preceding the filing of the lawsuit. The court will order the agency that has custody of you to withdraw the initial partial filing fee from your prison or jail account as soon as funds are available and to forward the money to the court.

After the initial partial filing fee has been paid, you will owe the balance of the \$350.00 filing fee (you will not be required to pay the \$50.00 administrative fee). Until the filing fee is paid in full, each month you will owe 20% of your preceding month's income. The agency that holds you in custody will collect that money and forward it to the court any time the amount in your account exceeds \$10.00. The balance of the filing fee may be collected even if the action is later dismissed, summary judgment is granted against you, or you fail to prevail at trial.

To file an action without prepaying the filing fee, and to proceed with an action *in forma pauperis*, you must complete the attached form and return it to the court with your complaint. You must have a prison or jail official complete the certificate on the bottom of the form and attach a certified copy of your prison or jail account statement for the last six months. If you were incarcerated in a different institution during any part of the past six months, you must attach a certificate and a certified copy of your account statement from each institution at which you were confined. If you submit an incomplete form or do not submit a prison or jail account statement with the form, your request to proceed *in forma pauperis* will be denied.

Even if some or all of the filing fee has been paid, the court is required to dismiss your action if: (1) your allegation of poverty is untrue; (2) the action is frivolous or malicious; (3) your complaint does not state a claim upon which relief can be granted; or (4) your complaint makes a claim against a defendant for money damages and that defendant is immune from liability for money damages.

If you file more than three actions or appeals which are dismissed as frivolous or malicious or for failure to state a claim on which relief can be granted, you will be prohibited from filing any other action *in forma pauperis* unless you are in imminent danger of serious physical injury.

4. Do you have any other sources of income, savings, or assets either inside or outside of the institution where you are confined? ☐ Yes ☐ No

If "Yes," state the sources and amounts of the income, savings, or assets. _____

I declare under penalty of perjury that the above information is true and correct.

DATE

SIGNATURE OF APPLICANT

CONSENT TO COLLECTION OF FEES FROM TRUST ACCOUNT

I, _____, hereby consent to having the designated correctional officials at this institution release to the Court my trust account information. I further consent to having the designated correctional officials at this institution withdraw from my trust account the funds required to comply with the order of this Court for the payment of filing fees in accordance with 28 U.S.C. § 1915(b).

My consent includes withdrawal from my account by correctional officials of partial initial payments to this Court equal to 20% of the greater of:

(A) the average monthly deposits to my account for the six-month period preceding my filing of this action, or

(B) the average monthly balance in my account for the six-month period preceding my filing of this action.

My consent also includes monthly withdrawals from my account by correctional officials of an amount equal to 20% of each month's income. Whenever the amount in my account reaches \$10.00, correctional officials will withdraw that amount and forward it to the Court until the required filing fee is paid in full. I understand that I am liable for paying the entire fee, even if my case is dismissed by the Court before the fee is fully paid.

DATE

SIGNATURE OF APPLICANT

CERTIFICATE OF CORRECTIONAL OFFICIAL AS TO STATUS OF APPLICANT'S TRUST ACCOUNT

I, _____, certify that as of the date applicant signed this application:

(Printed name of official)

The applicant's trust account balance at this institution is: \$ _____

The applicant's average monthly deposits during the prior six months is: \$ _____

The applicant's average monthly balance during the prior six months is: \$ _____

The attached certified account statement accurately reflects the status of the applicant's account.

DATE

AUTHORIZED SIGNATURE

TITLE/ID NUMBER

INSTITUTION